

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

ANDREW F. ZAZZALI (1925-1969)

ONE RIVERFRONT PLAZA, SUITE 320

NEWARK, N.J. 07102-5410

Telephone: (973) 623-1822

Telecopier: (973) 623-2209

GENEVIEVE M. MURPHY-BRADACS**

EDWARD M. SUAREZ, JR.

CYNTHIA REVESZ†

AILEEN M. O'DRISCOLL*

MARISSA A. McALEER**

FLAVIO L. KOMUVES*

ANDREW F. ZAZZALI, JR.

ROBERT A. FAGELLA**

KENNETH I. NOWAK***

RICHARD A. FRIEDMAN

PAUL L. KLEINBAUM*

EDWARD H. O'HARE*

SIDNEY H. LEHMANN*

COLIN M. LYNCH**

150 West State Street

Trenton, New Jersey 08608

Telephone: (609) 392-8172

Telecopier (609) 392-8933

OF COUNSEL

KATHLEEN NAPRSTEK CERISANO

JASON E. SOKOLOWSKI

WILLIAM A. PASCARELL (1934-2010)

COUNSEL

JAMES R. ZAZZALI***

www.zazzali-law.com

*Also admitted Pennsylvania

**Also admitted New York

***Also admitted New York & D.C.

†New York Only

Please Reply to Newark

April 8, 2015

VIA ELECTRONIC FILING

Gary Shinnars, Executive Secretary

National Labor Relations Board

1099 14th Street, NW

Washington, D.C. 20570-0001

Re: Americold and IBT Local 863

Case No. 04-RC-134233

Dear Mr. Shinnars:

This office represents Petitioner Teamsters Local 863 in the above-referenced matter. I am enclosing Petitioner's Brief in Opposition to the Employer's Request for Review of the Regional Director's Decision and Direction of Election and Certification of Service in this matter.

Very truly yours,

Paul L. Kleinbaum

Enclosure

PLK:sl

cc: Dennis P. Walsh, Regional Director (via email & regular mail)

Sheldon Kline, Esq. (via email & regular mail)

Matthew G. Boyd, Esq. (via email & regular mail)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICOLD LOGISTICS, LLC,

Employer,

and

TEAMSTERS LOCAL 863,

Petitioner,

and

TEAMSTERS LOCAL 229,

Intervenor.

Case No. 04-RC-134233

**PETITIONER'S OPPOSITION TO THE EMPLOYER'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

Paul L. Kleinbaum, Esq.
Marissa A. McAleer, Esq.
ZAZZALI FAGELLA NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza – Suite 320
Newark, New Jersey 07102
Telephone: (973) 623-1822
Facsimile: (973) 623-2209
pkleinbaum@zazzali-law.com

Attorneys for Petitioner Teamsters Local 863

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I. PRELIMINARY STATEMENT

The Employer failed to meet its heavy burden to demonstrate that there are compelling reasons to grant review of the Regional Director's Decision and Direction of Election ("DDE"). The Regional Director properly applied the Board's decision in Specialty Healthcare. Despite its protestations to the contrary, the Employer failed to demonstrate the compelling reasons necessary to grant review. The Regional Director thoroughly analyzed the differences and similarities between Checkers and Warehousemen at the Employer's Gouldsboro facility as required by Specialty Healthcare. Based upon this analysis, the Regional Director correctly concluded that the Checkers do not share an overwhelming community interest with the Warehousemen.

Additionally, the Employer now argues that the Board should remand this matter to the Regional Director to take additional evidence on its argument that the DDE violates Section 9(c)(5) of the Act. The Employer's argument is the height of hubris. The Employer was given full and fair opportunity to present all evidence in support of its position on this as well as other issues during the hearing. The Employer presented all of the evidence it intended to present. It was not denied any opportunity to present evidence, nor did the Hearing Officer preclude the Employer from presenting any evidence or asking any questions. There is sufficient evidence in the record for the Board to decide this issue.

Finally, the Employer continues to argue that the Regional Director should have deferred this case indefinitely to the IBT's internal process. The Regional Director properly rejected the Employer's invitation to continue to defer this matter. At the time of the Regional Director's decision, the matter had been pending before the IBT for well over six months. The IBT has never given any indication that it intends to decide the dispute. Moreover, the IBT requested

deferral in October, a request that was granted. It made no further requests for deferral even after being notified in December that the Region would defer the matter only until January 15th, at which time the Regional Director issued an order reinstating the hearing. The Employer has presented no authority for its argument that the Board should defer this matter indefinitely. Its argument is nothing less than an attempt to oust the Board of its exclusive jurisdiction to decide questions concerning representation and an effort to deny employees of their rights under Section 7 to choose, or not choose, to be represented by Local 863.

As argued more fully below, the Employer failed to meet the heightened standard required by Specialty Healthcare. There is no reason to defer this matter any further or to remand it. The Board should deny the Employer's request for review.

II. PROCEDURAL HISTORY

Local 863 filed its RC petition and showing of interest on August 7, 2014, seeking a unit of “all full-time and regular part-time checkers.” Region 4 scheduled the hearing for August 18, 2014, but adjourned the hearing until August 22, 2014 in its August 15, 2014 “Order Rescheduling Hearing.” By letter dated August 20, 2014, the Employer’s counsel advised the Region that Local 229 had initiated internal procedures the previous day (August 19th) with the International Brotherhood of Teamsters (“IBT”) to resolve jurisdictional disputes, and thus requested that the Region defer proceedings pending the outcome of the IBT’s internal process. Local 863 advised the Region and the parties via email that it objected to any further postponement. On August 21, 2014, the Region advised the parties via email that the hearing was indefinitely postponed and cited to Section 11019 of the Representation Case Handling Manual. The Region issued an order postponing the hearing indefinitely on August 21, 2014.

The parties received a letter dated August 28, 2014 from the NLRB Associate Executive Secretary confirming that the hearing was suspended for 40 days to enable the IBT’s internal proceedings to be utilized. On October 8, 2014, the parties were advised by the Region via email that it would continue to defer the matter until December 15th at the IBT’s request. On December 15, 2014, the parties received a letter of the same date from the NLRB Associate Executive Secretary further deferring the matter at the request of Region 4’s Assistant to the Regional Director until January 15, 2015. When there was no word from the IBT about a resolution of the internal process by January 15th, the Region issued an Order dated January 16, 2014 reinstating the Notice of Hearing and advising the parties that the hearing was rescheduled for February 2, 2015. The IBT did not make any further requests to defer this matter.

On January 23, 2015, Local 229 filed a UC petition. By letter dated January 27, 2015, the Employer and Local 229 apparently filed a joint request to adjourn the February 2, 2015 hearing pending the outcome of a grievance filed by Local 229. Local 863 did not receive the letter until January 28, 2015, wherein the Employer and Local 229 for the first time advised the Region that Local 229 filed a grievance in December 2014 over the status of the Checkers – the employees at issue in the RC and UC petitions – and that the Employer and Local 229 agreed upon an arbitrator. At no time prior to the January 27th letter did the Employer or Local 229 advise the NLRB, Region 4, Local 863, or the IBT of the existence of a grievance or the designation of an arbitrator. By letter dated January 29, 2015 to the Regional Director, Local 863 objected to any further postponement of the hearing and moved to dismiss Local 229's UC petition. By Order dated January 29, 2015, the Regional Director denied the Employer and Local 229's request to adjourn the hearing. The Regional Director dismissed Local 229's UC petition by Decision and Order dated January 30, 2015. Local 229 did not request review of this decision.

Hearings were conducted on February 2, 2015 and February 6, 2015 in this matter, and the record closed on February 9, 2015. The Regional Director issued an Order dated February 10, 2015 granting the parties' request to extend the deadline for filing briefs until February 24, 2015.

On or about March 16, 2015, the Regional Director issued his Decision and Direction of Election. The Regional Director concluded that the Checkers constitute a readily identifiable group of employees who share a community of interest and that the Warehousemen do not share an overwhelming community of interest with the petitioned-for unit. Accordingly, the Regional Director concluded that the following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:¹

¹ The Regional Director subsequently directed an election on Friday, April 10, 2015.

All full-time and regular part-time Checkers employed by the Employer at its 200 First Avenue, Gouldsboro, Pennsylvania facility; excluding all other employees, office clericals, Order Selectors, Maintenance employees, Sanitation employees, Customer Service employees, Inventory Control employees, guards, and supervisors as defined in the Act.

On March 30, 2015, the Employer filed its request for review of the DDE. Intervenor Teamsters Local 229 did not request review. Petitioner Teamsters Local 863 now files its opposition to the Employer's request for review.

III. STATEMENT OF FACTS

The Employer's request for review arises from the Regional Director's DDE issued on March 16, 2015. In his decision, the Regional Director correctly concluded that a unit of the Employer's Checkers – the petitioned-for unit – is an appropriate unit for collective bargaining.

During the hearing, the parties stipulated that the Employer, Americold Logistics, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act ("NLRA"). (Tr.10:24-Tr.11:3). Americold is a company that stores and distributes frozen food. (Tr.48:1-4). It takes frozen food into its facility, and then ships it to grocery stores. Id. The parties further stipulated that both Local 863 and Local 229 are labor organizations within the meaning of Section 2(5) of the NLRA. (Tr.40:1-15). The parties also stipulated that the group of employees known as "Checkers" are not covered by the collective bargaining agreement between Local 229 and the Employer at the Gouldsboro facility, and that there is no contract bar to the representation proceeding. (Tr.40:25-Tr.41:8).

In the 75 to 80 of Americold's facilities across the Country that are represented by various unions, two group of employees – Warehousemen and Checkers – are generally treated as one bargaining unit. (Tr.173:7-Tr.175:8). The Checker position is unique to the Gouldsboro facility, as the Employer's other facilities do not have a job classification of "Checker," but rather, only have a "Warehousemen" classification. (Tr.171:8-Tr.172:4). The Employer's employee in charge of labor relations functions conceded that Gouldsboro is an "anomaly" because Checkers and Warehousemen are treated separately and as two distinct groups of employees. (Tr.175:13-Tr.176:11). The Employer's treatment of Checkers as a separate classification is also reflected in Employer Exhibit 2 which shows the shifts and hours worked by Checkers and Warehousemen. Each classification is broken out separately.

The Warehousemen² at the Gouldsboro location are represented by Local 229. (Tr.49:10-15). Representation of the Warehousemen by Local 229 at the Gouldsboro location began in 2008 by voluntary recognition. (Tr.19:24-Tr.20:3); (Tr.184:24-25). Local 229 and the Employer did not include Checkers in the unit. (Tr.20:3-5); Employer Exhibit 1. In 2013, there were discussions between Local 229 and the Employer about including the Checkers in the bargaining unit of Warehousemen, but those discussions did not result in the Checkers being included in the Warehousemen unit. (Tr.181:17-22). In December 2014, Local 229 filed a grievance with the Employer, arguing that the Checkers were included the bargaining unit of Warehousemen represented by Local 229. (Tr.35:10-15); (Tr.186:5-24); Intervenor Exhibit 1. The grievance was denied by the Employer on the grounds that “[p]er the collective bargaining agreement, the checker position is a non-union job function (Article I). Therefore the grievance is denied.” Intervenor Exhibit 1.

Local 863 represents approximately 70 Drivers from two outside companies, Jed and Ironclad, who deliver product from the Gouldsboro facility to customers. (Tr.162:15-Tr.164:2). They are not employed by Americold, nor do they work in the warehouse. Id.

Warehousemen and Checkers both work in the warehouse department at the Gouldsboro facility. (Tr.56:14-16). However, they perform entirely different duties and functions within that department. There are 22 Checkers and 250 Warehousemen at Gouldsboro. (Tr.65:7). Checkers work primarily on the dock, while Warehousemen work primarily inside the warehouse, with the two locations being physically separated by a wall. (Tr.86:1-15). There are two types of Checkers – inbound and outbound. There are four or five inbound Checkers, and the remaining Checkers are outbound Checkers. (Tr.86:12-Tr.87:23). Inbound Checkers deal with products

² Warehousemen refer to the Pallet Jack Operators and Fork Lift Operators. (Tr.66:22-Tr.67:24).

coming into the facility. They check inbound product and put it into the system when it comes to the dock. The Employer has an unloading service with an outside company that unloads the trailers. The actual unloading is not performed by inbound Checkers. Id. (Tr.136:17-Tr.137:24). The inbound Checkers make sure that product coming off a truck is correct. (Tr.87:11-Tr.88:4).

Outbound Checkers take the pallets that are dropped on the dock by the Warehousemen, check them to make sure they are correct, and load them onto the trucks to be sent to customers. (Tr.87:24-Tr.88:9); (Tr.138:5-Tr.139:17). Checkers do not normally pick products, put products on a pallet, or bring products out to the dock from the warehouse; that is the job of Warehousemen. (Tr.88:15-Tr.92:1). Normally, a pallet is brought to the assigned door on the dock by a Warehousemen, who operates a truck lift, at which point the outbound Checker checks the pallet to make sure it has the correct product for a particular customer and loads it onto the truck. (Tr.91:6-Tr.92:14). The outbound Checkers are also responsible for doing a count of particular high value items to make sure the correct number of items go to the correct customer. (Tr.92:16-Tr.93:10). Ultimately, the responsibility of the outbound Checker is to make sure the correct items get onto the correct truck for the correct customer. (Tr.94:9-12). If there is a problem with a pallet – such as it being poorly wrapped or broken – it is the Checker's responsibility to bring that problem to the attention of a supervisor or the Warehouseman who picked the pallet. (Tr.100:2-Tr.101:14).

The Checkers have common supervision, and they have a common designated supervisor on any given shift. (Tr.142:19-Tr.146:2). They use the same equipment. (Tr.59:4-29). They have the same job descriptions and functions. (Tr.57:20-Tr.60:23); Employer Exhibit 3. They receive the same training. (Tr.61:17-Tr.62:2). They use the same management software in performing their duties. (Tr.63:7-23). They receive the same benefits. (Tr.132:6-8).

There are numerous distinctions between Warehousemen and Checkers. Other than the point of interaction between Warehousemen and Checkers when the product goes from the dock to the warehouse, or vice-a-versa, Warehousemen and Checkers generally perform unique duties and functions, as set forth above. (Tr.148:13-Tr.149:20).

While all Checkers have worked as Warehousemen in the past, Warehousemen have not previously worked as Checkers before becoming Warehousemen. (Tr.101:23-Tr.102:4). There is computer software used at the Gouldsboro facility that Warehousemen use on the computers located on their forklifts; Checkers, on the other hand, use this computer program on their hand scanners, which is equipment that Warehousemen do not have. (Tr.94:13-Tr.97:11). Warehousemen use headsets, but Checkers do not use headsets. (Tr.95:6-15). Safety gear used by Checkers and Warehousemen is generally the same, but the Checkers have high visibility vests worn on the dock that Warehousemen do not wear. (Tr.113:22-Tr.114:5). While the Checkers and Warehousemen generally work the same schedules, there are Checkers who have schedules that are not worked by any Warehousemen. (Tr.110:3-Tr.113:20).

On the occasions when Warehousemen have to work as Checkers, it is primarily because there are a limited number of Checkers. If some of them are out, Warehousemen will have to be used to replace them. However, there are only 10-15 Warehousemen – only about 5% of the total number of Warehousemen – who can work as Checkers. (Tr.150:3-Tr.151:13). These are the Warehousemen who received the training to do the work of a Checker, namely, training on how to properly load the trucks and use the hand-held scanners. (Tr.158:2-7); (Tr.162:9-14).

Local 229 and the Employer agreed and stipulated that Checkers are not included in the collective bargaining agreement. Employer Exhibit 1. Checkers do not have a contract, and they do not have a wage scale like the Warehousemen have. (Tr.106:16-Tr.109:9). Non-wage benefits

are the same, in that they are company-wide benefits that apply to all employees (not just to Checkers and Warehousemen). (Tr.132:6-15). But the wages of Checkers and Warehousemen are different. Id. Specifically, Warehousemen have a contractual salary guide, but Checkers do not. Id.; Employer Exhibit 1. Warehousemen reach the top step of the salary guide after 42 months, and the top step increases by forty cents per year. Id. There is no similar means for Checkers to reach a top step, nor is there a guarantee of yearly salary increases. Id. Checkers usually receive wage increases in January of every year, but they did not receive one in January 2015. Id. The Employer agreed that Checkers and Warehousemen do not receive the same increases. Id.

Warehousemen have a productivity standard they must meet, but Checkers do not. The Employer presented testimony that it is working on creating one for Checkers. (Tr.102:19-Tr.103:20). Warehousemen and Checkers also receive incentives in addition to their hourly rate, but the incentives for each group are different. (Tr.104:1-Tr.105:10). Checkers' incentives are based on time using the hand scanner, while incentives for Warehousemen are based on the productivity standard. Id. The incentive for Checkers is \$2.00/hour; for Warehousemen, it can be as much as \$4.00/hour. Id.

Checkers do not have a grievance and arbitration procedure; Warehousemen have the procedure in their collective bargaining agreement. (Tr.109:10-18); Employer Exhibit 1. Warehousemen have a seniority list and their shifts are assigned by bid based on seniority that is posted. Checkers do not have a seniority list, and they also do not have a shift-bidding system. (Tr.114:6-Tr.116:8). Both groups get six paid time off days per year, but under the collective bargaining agreement for Warehousemen, all six of those days can be unscheduled; Checkers are only allowed two unscheduled days out of those six. (Tr.118:11-Tr.119:5).

IV. ARGUMENT

A. THE BOARD SHOULD DENY THE REQUEST FOR REVIEW BECAUSE THE EMPLOYER HAS FAILED TO MEET ITS HEIGHTENED BURDEN BY SHOWING COMPELLING REASONS THAT WOULD JUSTIFY ITS REQUEST.

1. Standard of Review.

Americold's Request for Review is governed by 29 C.F.R. §102.67 which provides, in relevant part, as follows:

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Americold has not met, and cannot meet, this demanding standard. As discussed below, it has failed to present any compelling reason to grant review of the DDE.

2. The Regional Director's Decision Not to Continue to Defer to the IBT's Intra-Union Process is Consistent With Board Policy and Precedent, and the Employer's Request to Review the Regional Director's Decision Does Not Raise a Substantial Question of Board Policy.

After the processing of the representation petition had been deferred for more than five (5) months, the Regional Director decided not to defer the matter any longer and reinstated the notice of hearing on January 16, 2015. Despite having requested that the matter be deferred in October 2014, the IBT made no further request for deferral. Even though the IBT has given no indication that it will ever decide the issue, the Employer now argues that the Regional Director “pulled the plug” on and “usurped” the intra-union process and that his decision not to wait any longer was arbitrary. The Employer has cited no Board policy or precedent which requires, or even permits, further deferral for an indefinite period of time. In fact, the Employer's position would oust the Board of its authority to decide questions concerning representation and would deprive employees of rights protected by Section 7 of the Act, 29 U.S.C. §157.

It is well-settled that the Board will refuse to defer to a no-raid agreement because to do so would “[p]ermit a private resolution of the question concerning representation in a manner contrary to the policies of the Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation.” Cadmium & Nickel Plating, 124 NLRB 353, 354 (1959). See also Weather Vane Outwear Corp., 233 NLRB 414, 415 (1977); Anheuser-Busch Inc., 246 NLRB 29, 30 (1979).³ This is exactly what the Employer seeks by arguing that the Regional Director's decision to reinstate the processing of the RC petition after waiting for more than five (5) months is arbitrary and capricious. Simply put, the Employer's position is meritless.

³ While the Employer does not challenge the Regional Director's decision not to defer to the grievance process, and Intervenor Local 229 did not request review of the RD's decision, it should be noted that the Board will also not defer to grievance proceedings started after the filing of representation proceedings. Tweedle Litho, Inc., 337 NLRB 686 (2002).

The Employer makes the astounding statement that the Regional Director's decision "pulled the plug on" the IBT's internal dispute process and is contrary to Board case law, policies, and procedures. Yet the Employer cites no cases supporting this novel proposition, nor does it cite any policies or procedures which require the Regional Director to suspend indefinitely the processing of a representation petition even when there is no indication that there is an end to the internal process. The only support for its claim is the NLRB Representation Casehandling Manual, Sections 11018 and 11019. (Employer's Request for Review at 14-15). But there is nothing in either Section 11018.1 or 11018.2 which gives the Regional Director the authority to suspend proceedings indefinitely. Had the Regional Director acceded to the Employer's request, he would have acted contrary to Board policy and procedure of expeditiously resolving questions concerning representation. As a matter of comity, the Board does give the Regional Director the authority to defer the processing of a representation petition for a "[p]eriod not to exceed 40 days absent further communication from the Regional Office" to allow the parties to use an internal dispute resolution process. NLRB Representation Casehandling Manual Section 11018.2(a).⁴ But nothing in the Casehandling Manual gives the Regional Director the authority to suspend the processing of a petition indefinitely as the Employer now requests.⁵

It bears repeating that the representation petition was filed on August 7, 2014. Processing was deferred on several occasions at the request of the Employer, the IBT, and the Regional

⁴ Although the Employer seems to question whether this section is applicable (Employer's Request for Review at 16), there can be no reasonable dispute that the RC petition was part of an initial organizing activity. It is undisputed that the employees who are the subject of the petition – the Checkers – were not and never have been organized.

⁵ At the hearing, in response to the Hearing Officer's question, the Employer's counsel took the position that it would be acceptable to defer the processing of the petition for months or "[a] year or two years." (Tr.39:6-11).

Director. When it was deferred for the last time, the NLRB advised all parties on December 15, 2014, that it would defer the case until January 15, 2015. After hearing nothing from the IBT, the Regional Director issued an order on January 16, 2015 reinstating the notice of hearing. The IBT did not request any further deferral of the matter, nor did it give any indication that it would issue a decision.⁶

When he issued the January 16, 2015 notice of hearing, the Regional Director did not “pull the plug” or “usurp” the IBT’s internal procedures because the IBT has not acted and has given no indication of intent to act. The Regional Director had no choice but to resume processing Local 863’s petition given the Board’s authority to resolve questions concerning representation. This matter could not, and should not, be held in limbo indefinitely as the Employer now requests. To do so would frustrate the language and intent of the Act to expeditiously resolve questions concerning representation. Thus, the Employer failed to meet its burden to demonstrate that the Regional Director’s decision raises a substantial question of Board policy.

⁶ To date, the IBT has been silent on this issue.

3. The Regional Director Correctly Held That the Employer Failed to Meet its Heightened Burden to Demonstrate That Checkers Share an Overwhelming Community of Interest With the Warehousemen.

The Regional Director correctly noted that the law in this area is well-settled. The Board does not require that the petitioned-for unit be the only appropriate unit or even the most appropriate unit, but rather, only requires that the unit be *an appropriate unit*. International Bedding Co., 356 NLRB No. 168 (2011); Overnite Transportation Co., 322 NLRB 723 (1996); P.J. Dick Contracting, 290 NLRB 150 (1988). (DDE at 4-5). Thus, if it is determined that the proposed unit is an appropriate unit, the inquiry generally stops. Wheeling Island Gaming, 355 NLRB 637 (2010); Bartlett Collins Co., 334 NLRB 484 (2001). As the Board confirmed in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83, slip op. at 12 (2011),

[p]rocedurally, the Board examines the petitioned-for unit first. *If that unit is an appropriate unit, the Board proceeds no further.* As the Board recently explained, the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends.

(emphasis added) (quotation marks omitted) (citations omitted).

In its request for review, the Employer's claim that the Regional Director incorrectly applied the standard set forth in Specialty Healthcare is meritless. Significantly, the Employer now concedes that the Checkers are a readily identifiable group who share a community of interest. (Request for Review at 18). Nevertheless, the Employer now attempts to recast the Board's decision in Specialty Healthcare to create a new standard to support its view of the facts. Unfortunately for the Employer, the Regional Director correctly applied Specialty Healthcare based on the facts in the record and based on the standard enunciated by the Board.

More specifically, in Specialty Healthcare, supra at 10-13, the Board explained the analysis it applies when a party seeks a broader unit than the petitioned-for unit. First, the Board considers whether the petitioner's proposed unit consists of employees "who are readily identifiable as a group," based on job classifications, departments, functions, work locations, skills, or similar factors. Id. Then it considers whether these employees share a "community of interest." Id. To determine whether employees share a community of interest, the Board examines employee skills and job functions, whether there is common supervision of the employees, the contact and interchange amongst the employees, the similarities in wages, hours and other terms and conditions of employment, functional integration, and bargaining history. Publix Super Markets, 343 NLRB 1023 (2004); United Operations, Inc., 338 NLRB 123 (2002); Bartlett Collins Co., supra; Home Depot USA, 331 NLRB 1289 (2000). In Macy's, Inc., 361 NLRB No. 4, slip op. at 8 (2014) and Bergdorf Goodman, 361 NLRB No. 11, slip op. at 2 (2014), the Board made it clear that whether employees are "readily identifiable as a group" and whether they share a "community of interest" are two distinct inquiries that must be considered separately.

Pursuant to Specialty Healthcare, if the petitioner demonstrates that the petitioned-for unit is comprised of a readily identifiable group of employees sharing a community of interest, as the Employer now concedes, the burden shifts to the party seeking the broader unit to demonstrate "[t]hat employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit." Specialty Healthcare, supra. The Board referred to this burden as a "[h]eighted standard." Id. An overwhelming community of interest exists when there is no legitimate basis upon which to exclude these employees from the broader unit because the traditional community-of-interest factors overlap almost completely. See Fraser

Engineering Co., 359 NLRB No. 80, slip op. at 1 (2013); Specialty Healthcare, supra; Macy 's, Inc., supra at 9. The reason the party seeking the broader unit must make this showing was explained by the Board as follows:

[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate. More must be shown.

Specialty Healthcare, supra, slip op. at 15.

In this case, the Regional Director applied this standard correctly. Contrary to the Employer's allegations in its request for review, the Regional Director did not incorrectly focus more on the differences between the Checkers and the Warehousemen and less on the similarities. Rather, the Regional Director looked at both the similarities and differences between the two positions and determined that there was no overwhelming community of interest between the two groups. He looked at the traditional indicia of a community of interest and discussed where those factors were the same and where those factors were different between the two classifications of employees, and decided that the Employer did not meet its burden of demonstrating an overwhelming community of interest. (DDE at 12-14). This conclusion was consistent with Board precedent. See, e.g., Macy's Inc., supra. (employer did not demonstrate that the cosmetics and fragrances employees shared an overwhelming community of interest with other employees in the same store); Guide Dogs for the Blind, Inc., 359 NLRB No. 151 (2013) (employer did not demonstrate that petitioned-for unit of canine welfare technicians and instructors shared overwhelming community of interest with the other "dog handling" classifications); Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011) (employer

failed to demonstrate that group of technical employees shared an overwhelming community of interest with the employer's other technical employees).

The Employer's citation to FedEx Freight, Inc., Case 10-RC-136185 (October 21, 2014) in support of its claim that the Regional Director misapplied Specialty Healthcare is misplaced. FedEx Freight recites the standard set forth in Specialty Healthcare verbatim – it does not support Americold's claim that the Regional Director should have focused more on the similarities between two job classifications and less on the differences. Rather, both are to be considered, and the Employer has the burden of showing an overwhelming community of interest. Furthermore, and once again contrary to the Employer's allegations, the Regional Director did not state that no overwhelming community of interest will exist unless the two groups of employees are shown to be identical in every way. To the contrary, he considered the similarities and differences and concluded, in light of the numerous and significant distinctions between Checkers and Warehousemen, that the Employer failed to meet its burden. Specifically, the Regional Director held that "Warehousemen and the petitioned-for Checkers have distinct classifications, job functions, and work location." (DDE at 13). Americold's attempt to discount these significant distinctions is meritless and should be rejected.

The duties of Warehousemen and Checkers at the Gouldsboro facility are, to a great extent, separate and distinct, as noted above. (Tr.148:13-Tr.149:20); (Tr.87:24-Tr.88:9); (Tr.138:5-Tr.139:7); (Tr.136:17-Tr.137:24); (Tr.87:1-Tr.88:4); (Tr.92:16-Tr.93:10). The Regional Director agreed that these distinctions are significant:

Checkers stand out from other employees in that they primarily perform their duties on the dock, while, in contrast, Warehousemen mostly perform their work in the warehouse. The Checkers' checking duties make them distinct. It is the responsibility of checkers to ensure that the correct product is coming off and going on the trucks. In contrast, Warehousemen are responsible for

transporting product from and to the dock and have the in-between duties of stacking, sorting, and later picking the product in the warehouse for shipment.

(DDE at 12-13).

In addition, while the Checkers and Warehousemen generally work the same schedules, there are a couple of Checkers that have special schedules that are not worked by any Warehousemen. (Tr.110:3-Tr.113:20). On the limited occasions when Warehousemen have to work as Checkers, there are only 10-15 who can do so because they have received the Checkers' specific training on loading the trucks and using hand held scanners, which is training that Warehousemen generally do not receive. (Tr.150:3-Tr.151:13); (Tr.158:2-7); (Tr.162:9-14).

Regarding equipment, Warehousemen use computers located on their forklifts, while Checkers use the computer software on their hand scanners, which is equipment that Warehousemen do not have. (Tr.94:13-Tr.97:11). Warehousemen use headsets, but Checkers do not use headsets. (Tr.95:6-15). The safety gear of Checkers and Warehousemen is generally the same, but the Checkers have high visibility vests that they wear on the dock that Warehousemen do not wear in the warehouse. (Tr.113:22-Tr.114:5). The Regional Director confirmed these distinctions, noting that "[u]nlike Warehousemen, Checkers wear a high visibility vest while performing their duties on the dock. Checkers, but not warehousemen, use a handheld scanner rather than computer or headset while doing their job." (DDE at 13).

Checkers do not have a collective bargaining agreement, and they do not have a wage scale as do the Warehousemen. (Tr.106:16-Tr.109-9). Non-wage benefits are the same, in that they are company-wide benefits that apply to all employees (not just to Checkers and Warehousemen). (Tr.132:6-15). However, Warehousemen have a contractual salary guide, but Checkers do not. Employer Exhibit 1; (Tr.132:6-15); (Tr.106:16-Tr.109-9). Warehousemen

reach the top of their salary guide after 42 months, and the top of the salary guide increases by forty cents per year. Id. There is no similar progression for Checkers because they do not have a salary guide. Id. Checkers usually receive wage increases in January of every year, but they did not receive one in January of 2015. Id.

Regarding wages, the Regional Director properly concluded, based upon the evidence in the record, that there were significant distinctions between the two classifications of employees warranting the conclusion that they do not share an overwhelming community of interest:

The Checkers' hourly wage range has a higher minimum (by \$1.55) than Warehousemen. Warehousemen reach a maximum hourly wage rate after 42 months of service under a contractual progression, while checkers have no guarantee of any wage increases. Warehousemen receive an increase annually on July 7 during the current five-year contract, but checkers have no set schedule for wage increases.

(DDE at 13).

Thus, if a Warehousemen and a Checker are hired at the same time, the Warehousemen will earn more than the Checker because Checkers do not receive the wage increases pursuant to a set progression that the Warehousemen receive. This is clearly illustrated in Employer Exhibit 4 which sets forth the dates Warehousemen and Checkers were hired, and their wages. (Tr.75:16-Tr.80:13).⁷ By way of example, according to Employer Exhibit 4, employee #126213, a Warehousemen, was hired on January 7, 2008 and is currently receiving a wage of \$16.30 per hour. However, employee #126220, a Checker who was also hired on January 7, 2008, earns \$15.48 per hour. In another example, Warehousemen #129259, hired on June 27, 2011, earns \$16.05 per hour. A Checker, employee #129249, was also hired on June 27, 2011 but earns only

⁷ The last column shows which employees are Warehousemen, in that they are in the bargaining unit, and which are Checkers, who are not in the bargaining unit. The "GOT" designation indicates the employee is in the union, i.e., is a Warehousemen; those without that designation are Checkers.

\$14.82 per hour. And in yet another example, Warehousemen #126081, hired on September 20, 2007, earns \$16.30 per hour. However, Checker #126082, also hired on September 20, 2007, earns only \$15.85 per hour. The Employer did not refute this evidence in its Request for Review.

The incentives for the two groups of employees are also different. (Tr.104:1-Tr.105:10). This was confirmed by the Regional Director: "Warehousemen receive an incentive on a sliding scale of \$.50 up to \$4 per hour based on a productivity standard, while checkers effectively earn \$2 per hour in incentive since their efficiency standard has not been finalized." (DDE at 13).

Checkers do not have a grievance and arbitration procedure, but the Warehousemen do. (Tr.109:10-18). Warehousemen have a seniority list and their shifts are assigned by bid based on seniority. Checkers do not have a seniority list and do not have the same bidding system as Warehousemen. (Tr.114:6-Tr.116:8). The Regional Director confirmed that "Warehousemen have their shifts put out for bid roughly on a semi-annual basis, but Checkers do not." (DDE at 13). And regarding paid time off days, the Regional Director confirmed that "Checkers have 6 PTO days and Warehousemen generally have six sick days, but only two of the Checkers' days can be unscheduled while all of the Warehousemen's days can be unscheduled." (DDE 13).

The Employer has already stipulated that it does not recognize a unit of Warehousemen and Checkers. In 2013, there were discussions between Local 229 and the Employer about including the Checkers in the bargaining unit of Warehousemen, but Local 229 and the Employer did not include them in the unit. (Tr.181:8-24). Over one and a half years ago, Local 229 solicited cards from employees, but it never went anywhere. (Tr.185:13-20); (Tr.191:14-Tr.192:21). In December of 2014, Local 229 filed a grievance with the Employer, arguing that the Checkers were included in the bargaining unit of Warehousemen represented by Local 229. (Tr.35:10-15); (Tr.186:5-24); Intervenor Exhibit 1. The grievance was denied by the Employer

on the grounds that “[p]er the collective bargaining agreement, the checker position is a non-union job function (Article I). Therefore the grievance is denied.” Intervenor Exhibit 1. Inexplicably, Americold now argues that the only appropriate unit at Gouldsboro is a unit comprised of both Checkers and Warehousemen, the very unit it has until recently refused to recognize. Its complete about-face on this issue is rebutted by the distinctions between Warehousemen and Checkers as set forth above, which were accurately set forth by the Regional Director.

Furthermore, the Employer’s emphasis on “employee interchange” in its Request for Review is misplaced, and it was properly rejected by the Regional Director as a basis to find an overwhelming community of interest between the Warehousemen and the Checkers. Specifically, the Regional Director concluded that

[t]he record evidence of interchange is insufficient to demonstrate an overwhelming community of interest. Virtually every day on a shift, one of the approximately 244 Warehousemen does Checker work for eight hours, or two Warehousemen split those hours. In contrast, a Checker does Warehouseman work for about two hours about five times a month. Thus the amount of Warehousemen work performed by Checkers shows that overall, Warehousemen work makes up only a small fraction of Checkers’ duties, and the same is true of the limited Checker work performed by Warehousemen. Less than 10% of the Warehousemen perform this work on any regular basis.

(DDE at 13). Americold has not provided any reason to disturb the Regional Director’s factual findings and conclusions of law in this regard.

There is also no basis to Americold’s claim that the unit of Checkers is a fractured unit. Its citation to FedEx Freight in support of its claim was correctly addressed and rejected by the Regional Director. He concluded that a fractured unit would exist if the Checkers were divided into two units (by way of example, dividing Checkers into inbound Checkers and outbound

Checkers). However, because the Checkers are a readily identifiable group sharing a community of interest, as the Employer now concedes, and because there is a rational basis to exclude them from the Warehousemen because of their differences, the Checkers do not constitute a fractured unit. (DDE at 13-14).

In sum, because the Employer failed to meet the heightened standard required by Specialty Healthcare, the Employer's request for review should be denied.

B. THE EMPLOYER'S CLAIM THAT A UNIT OF CHECKERS VIOLATES SECTION 9(C)(5) OF THE ACT IS DEVOID OF MERIT BECAUSE THE REGIONAL DIRECTOR'S DECISION DID NOT GIVE CONTROLLING WEIGHT TO THE EXTENT OF THE EMPLOYEES' ORGANIZATION.

The Board should reject the Employer's argument that the Regional Director's decision is contrary to Section 9(c)(5) of the Act (Employer's Request for Review at 27). That section states that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. §159(c)(5). The Act does not prohibit any consideration of the extent of organization. It only prohibits giving the extent of organization controlling weight. Overnight Transportation Co., 325 NLRB 612, 614 (1998). See also Ritz-Carlton Hotel Co. v. NLRB, 173 F.3d 760, 766, f.n.5 (3d Cir. 1997).

Here, the Regional Director's determination was consistent with Section 9(c)(5) of the Act. He specifically noted that the extent of the employees' organization is not the controlling factor. (DDE at 14). Instead, he relied upon the fact that the Employer failed to present sufficient evidence to establish why Checkers have been included in bargaining units with Warehousemen at its other facilities. The Employer incorrectly argues that the Regional Director's decision could only give controlling weight to the extent of organization because all of its other facilities do not include units that include Checkers. Yet, the Employer presented no evidence that the situation at issue in the Employer's other facilities is comparable to the Gouldsboro facility, or why Warehousemen and Checkers' inclusion in one unit in other facilities has any bearing on what happens at Gouldsboro.

It is the Employer's position which is inconsistent with Section 9(c)(5) of the Act in this case. The Employer essentially argues that a unit of Checkers can never be appropriate because of the way in which its employees are organized at its other facilities throughout the country. This would preclude any consideration of the extent to which employees are organized at

Gouldsboro, a consideration which is entirely permissible under Section 9(c)(5). Thus, it is the Employer which is actually arguing for a unit which is contrary to Section 9(c)(5) of the Act.

Moreover, the Employer's position conveniently omits the fact that it and Local 229 negotiated over including Checkers in the unit. (Tr.181:8-24). It is certainly relevant that neither the Employer nor Local 229 could agree to include the Checkers in the bargaining unit. As the Board emphasized in Overnight Transportation, the fact that Local 863's petition reflects the extent of its organization of the petitioned for employees "[i]s a far cry from giving any weight, let alone controlling weight, to the union's extent of organization." (footnote omitted) Overnight Transportation Co., 325 NLRB at 614. In fact, as the Board noted in Overnight Transportation, a factor may be determinative in a close case and still not be considered controlling. Id. at 614, f.n.9.

The Employer's claim that the Hearing Officer limited its ability to present evidence defies credulity and is directly contradicted by the actual record. (Employer's Request for Review at 29-20). It now seeks a remand even though it was given a full and fair opportunity to presents its evidence. When Local 863 objected to the Employer's questions about the collective bargaining practices at other facilities, the Hearing Officer overruled the objection and allowed the Employer to proceed (Tr.170:22-171:9). While the Hearing Officer suggested he might be inclined to agree with the objection, he noted that evidence should be placed on the record for the decision writer. (Tr.171:4-12). The Hearing Officer does not write the decision. When the Hearing Officer requested that the Employer be "succinct," the Employer agreed without objection. (Tr.171:4-9). More importantly, the Hearing Officer did not prevent the Employer from asking one question, nor did the Hearing Officer cut off counsel's examination at any time. There are no grounds on which to remand this issue.

For these reasons, the Employer has failed to demonstrate that the Regional Director gave controlling weight to the extent of the employees' organization contrary to 29 U.S.C. §159(c)(5). The Employer has not raised, and cannot raise, a substantial issue warranting review of the Regional Director's decision.

C. ALTERNATIVELY, IF THE BOARD DETERMINES THAT THE CHECKERS LACK A COMMUNITY OF INTEREST SEPARATE AND APART FROM THE WAREHOUSEMEN, IT SHOULD CONCLUDE THAT THE PETITIONED-FOR UNIT OF CHECKERS CONSTITUTES AN APPROPRIATE RESIDUAL UNIT.

The Regional Director determined that it was not necessary to reach the issue of whether the Checkers constitute a residual unit because he concluded that the Checkers constitute an appropriate unit that do not share an overwhelming community of interest with the Warehousemen. (DDE at 2, f.n.3). However, assuming, *arguendo*, that the Board determines that the Regional Director was incorrect and that the petitioned-for unit of Checkers lacks a community of interest separate and apart from the unit of Warehousemen, the Board should nevertheless conclude that the petitioned-for unit of Checkers constitutes an appropriate residual unit. See, e.g., N.L.R.B. v. Sav-On-Drugs, 709 F.2d 536 (9th Cir. 1983) (noting that in a Request for Review, the Board is authorized to review the Regional Director's decision and all aspects of the record and arrive at findings and conclusions different from those reached by the Director).

In determining whether a petitioned-for unit is an appropriate residual unit, the following analysis is conducted:

Where a portion of a work force is already organized, the Board evaluates subsequent petitions to represent remaining employees first to determine whether the petitioned-for employees share a community of interest apart from the represented unit employees. See Carl Buddig & Co., 328 NLRB 929 (1999). If the community of interest is not separate and distinct such that they are not an appropriate separate unit, the Board looks to whether they are an appropriate residual unit. Id. A residual unit is appropriate "if it includes all unrepresented employees of the type covered by the petition." Id. (quoting Fleming Foods, 313 NLRB 948, 949 (1994)).

In re G.L. Milliken Plastering, 340 NLRB 1169 (2003). See also Elliott Precision Block Co., 218 NLRB 141 (1975); Pepsi-Cola Bottling Company of Cincinnati, 189 NLRB 105 (1971);

Carborundum Co., 115 NLRB 216 (1956); D.Warren Co., 114 NLRB 410 (1955); Red Dot Foods, Inc., 114 NLRB 145 (1955).

The Board has recognized units, such as the one here, as appropriate residual units. For example, in Carborundum, supra, hourly clerks constituted a bargaining unit that had been represented by a union for 12 years, but salaried clerks remained unrepresented. In fact, the employer and the union representing the hourly clerks had expressly agreed to exclude salaried clerks from the unit at the time of the parties' consent-election agreement. The Board therefore concluded, over the employer's objection and request that the salaried clerks be included in the unit with the hourly clerks, that a residual unit of salaried clerks as petitioned for by a separate union was an appropriate unit.

Similarly, in D.Warren Co., supra, the Board determined that a unit of laboratory employees employed by a paper manufacturer was an appropriate residual unit. Specifically, the laboratory employees had been excluded from the production and maintenance unit. The Board concluded that since the laboratory employees performed similar functions and had the common primary function of controlling the quality of the employer's product as the production and maintenance unit, there was a substantial community of interest amongst both groups of employees. However, since the laboratory employees had been excluded from the production and maintenance unit, they constituted an appropriate residual unit.

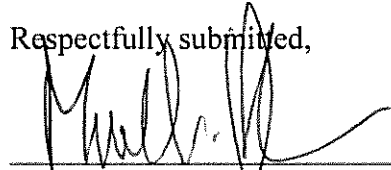
If the Board finds that the Regional Director erred in concluding that the Checkers constitute an appropriate unit, then it should conclude that they constitute an appropriate residual unit. The proposed residual unit includes all the unrepresented employees of the type sought by the petition. Denying the Checkers representation in a separate residual unit will preclude their opportunity to vote on representation. As in the cases cited above, the Employer has expressly

excluded the Checkers from the unit of Warehousemen represented by Local 229. Despite Local 229's belated attempt to include Checkers in the unit, those efforts have failed and the Employer has expressly stated that "[p]er the collective bargaining agreement, the checker position is a non-union job function (Article I)." Intervenor Exhibit 1. There can be no dispute that Checkers have been expressly excluded from the unit of Warehousemen and deprived of their organizational rights. Thus, the Board should find that they constitute an appropriate residual unit.

V. **CONCLUSION**

For all the foregoing reasons, Petitioner Teamsters Local 863 respectfully requests that the Board deny the Employer's request for review of the Regional Director's Decision and Direction of Election.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Paul L. Kleinbaum', is written over a horizontal line.

Paul L. Kleinbaum, Esq.
Marissa A. McAleer, Esq.
ZAZZALI FAGELLA NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza – Suite 320
Newark, New Jersey 07102
Telephone: (973) 623-1822
Facsimile: (973) 623-2209
pkleinbaum@zazzali-law.com
Attorneys for Petitioner Teamsters Local 863

Dated: April 8, 2015

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICOLD LOGISTICS, LLC,

Employer,

and

TEAMSTERS LOCAL 863,

Petitioner,

and

TEAMSTERS LOCAL 229,

Intervenor.

Case No. 04-RC-134233

CERTIFICATE OF SERVICE

I, the undersigned, am a legal assistant with the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys for Petitioner Teamsters Local 863 in the above matter.

On April 8, 2015, I caused to be filed Petitioner's Opposition to the Employer's Request for Review of the Regional Director's Decision and Direction of Election and this Certificate of Service as follows:

Via electronic filing to:

Gary Shinnors, Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

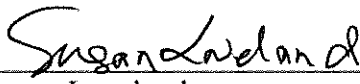
And via email and regular first-class mail, postage prepaid to:

Dennis P. Walsh, Regional Director
NLRB Region 4
615 Chestnut Street – Suite 710
Philadelphia, PA 19106-4404

Sheldon Kline, Esq.
Sheppard, Mullin, Richter & Hampton, LLP
2099 Pennsylvania Avenue, NW – Suite 100
Washington, DC 20006

Matthew Boyd, Esq.
Elliott Greenleaf
201 Penn Avenue – Suite 202
Scranton, PA 18503

I hereby certify that the foregoing, statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Susan Loveland

Dated: April 8, 2015